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CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the information (Appendix A, *infra*, pp. 9–10; R. 12–13), is not reported.

JURISDICTION

On December 21, 1962, the district court dismissed the information on the ground that it did not allege an offense under Section 301(k) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 331(k) (R. 12–13). A notice of appeal to this Court was filed in the district court on January 18, 1963 (R. 15–16). The jurisdiction of this Court to review on direct appeal a judgment dismissing an information on the ground that it does not charge an offense within the meaning

of the statute upon which the information is founded rests upon 18 U.S.C. 3731.

QUESTION PRESENTED

Whether the storage by a public warehouse of food (that had been shipped in interstate commerce) under insanitary conditions, so that the food was exposed to and contaminated by filth, violated Section 301(k) of the Federal Food, Drug, and Cosmetic Act.

STATUTE INVOLVED

Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended:

> Section 301 [21 U.S.C. 331]. The following acts and the causing thereof are prohibited:
>
> * * * * *
>
> (k) The alteration, multilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.
>
> Section 402. [21 U.S.C. 342]. A food shall be deemed to be adulterated—
>
> (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or where-

by it may have been rendered injurious to health; * * *

* * * * *

STATEMENT

The appellee, a public storage warehouse, was charged by criminal information with six violations of Section 301(k) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(k)]. That section prohibits, *inter alia*, "the doing of any other act with respect to, a food * * * if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated." The six counts differed only with respect to the particular shipment or product involved. In substance, each count charged (1) that the appellee had received an article of food which had been shipped in interstate commerce; (2) that while this article was being held for sale the appellee caused it to be held in a building that was accessible to rodents, birds, and insects, thus exposing the food to contamination; (3) that the food thereby became adulterated within the meaning of 21 U.S.C. 342(a)(3) and 342(a)(4), in that it consisted in part of a filthy substance due to the presence therein of rodent excreta, insects, insect larvae and insect pupae (subsection (3)), and was held under insanitary conditions whereby it may have become contaminated with filth (subsection (4)) (App. B., *infra*, pp. 11–21; R. 1–8).

The district court granted a motion to dismiss the information (App. A, *infra*, pp. 9–10; R. 12–13).

The court ruled that "the statute, as it is presently written, is too vague and indefinite to apply to the mere act of 'holding' goods." It held that under the rule of *ejusdem generis* the words "the doing of any other act" in Section 301(k) must be limited to acts of "the same general nature" as those specifically prohibited, namely, acts involving the labeling of articles (App. A, *infra*, p. 10; R. 13).

THE QUESTION IS SUBSTANTIAL

The holding of the court below that Section 301(k) does not prohibit the storage of food under insanitary conditions whereby it becomes or may become contaminated with filth is contrary to both the clear language of the statute and its legislative history. The decision denies the public protection in an important matter of health regulation.

1. Section 301(k) prohibits—

> the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act * * * results in such article being adulterated or misbranded.

Section 402 provides that a food shall be deemed "adulterated"—if it has been—

> * * * held under insanitary conditions whereby it may have become contaminated with filth * * *.

Reading the definition of "adulterated" back into Section 301(k), the latter section plainly prohibits—

> the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act * * * results in such article being held under insani-

> tary conditions whereby it may have become contaminated with filth * * *.

Thus, the words of the statute plainly cover the present case.

The district court held that the words "the doing of any other act" reach only acts that relate to the labeling of products because the other activities prohibited by Section 301(k)—"alteration, mutilation, destruction, obliteration or removal"—pertain only to the labeling. The reasoning misconceives the grammatical structure of Section 301(k). For while the terms last quoted explicitly refer to labeling, the phrase "the doing of any other act" speaks of an act "with respect to, a food, drug, device, or cosmetic." Furthermore, the district court's construction would make the statute virtually inoperative in the field of adulteration—a concept that involves the content or condition of the product and not the accuracy or adequacy of the labeling.

The legislative history of the Act shows that Congress explicitly intended to reach the storage of foods under insanitary conditions which resulted in their becoming contaminated. Prior to 1948, Section 301(k), although phrased in the same language as the present statute, prohibited only misbranding. The House Committee report on the 1948 amendment stated (H. Rep. No. 807, 80th Cong., 1st Sess., p. 3, emphasis added) that by

> amend[ing Section 301(k)] so as to cover adulteration as well as misbranding * * * *the subsection will penalize,* among other acts resulting

> in adulteration or misbranding, *the act of holding articles under insanitary conditions whereby they may become contaminated with filth or rendered injurious to health.*

The legislative history also makes it clear that Congress did not intend "the broad phrase 'any other act with respect to' the article" to be "limited by the preceding enumeration of forbidden acts with respect to the labeling * * *. [U]nder the subsection as now in force the rule of *ejusdem generis* would not apply in interpreting the words 'or the doing of any other act * * *', and it is even more clear that this rule will not apply in the interpretation of the subsection as amended by this bill" (*id.*, pp. 3–4). The Committee was apparently referring to this Court's decision in *United States* v. *Sullivan*, 332 U.S. 689. There the Court, in construing Section 301(k) when it prohibited only misbranding, refused to apply the rule of *ejusdem generis* to limit the words "any other act" to acts relating to labeling. The Court held that the transfer of a drug from a properly labeled container to an improperly labeled one constitutes "the doing of any * * * act" which resulted in the drug being misbranded, even though, as the dissenting opinion pointed out (332 U.S. 705, 707), such act was not related to "alteration, mutilation, destruction, obliteration, or removal" of any part of a label.[1]

[1] Following *Sullivan*, several courts of appeals similarly held in misbranding cases that the words "the doing of any other act" were not limited to acts relating to labeling. *United States* v. *2600 State Drugs*, 235 F. 2d 913 (C.A. 7), certiorari denied, 352 U.S. 843; *United States* v. *Carlisle*, 234 F. 2d 196 (C.A. 5),

The district court erred in ruling that the statute is "too vague and indefinite" to cover the act of storage. The arguments previously made demonstrate that Section 301(k) gave the appellee fair warning that the conduct with which it was charged—the holding of food under insanitary conditions which led to its contamination—constituted "the doing of any * * * act" which resulted in the food being adulterated. Cf. *United States* v. *National Dairy Products Corp.*, No. 18, this Term, decided February 18, 1963.

2. The question is plainly important in the administration of the Federal Food, Drug and Cosmetic Act. The Food and Drug Administration has advised that approximately 20 percent of its criminal cases involve contamination resulting from storage of food under insanitary conditions.[2] The strong public interest in protection against exposure to contaminated food calls for review and reversal of a decision which, if allowed to stand, would have such an obviously deleterious effect upon the public health.

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certiorari denied, 352 U.S. 841; *Archambault* v. *United States*, 224 F. 2d 925 (C.A. 10); *United States* v. *H. Wool & Sons, Inc.*, 215 F. 2d 95 (C.A. 2); *United States* v. *El-O-Pathic Pharmacy*, 192 F. 2d 62 (C.A. 9).

[2] For the fiscal years ended June 30, 1960 and 1961, the total number of such cases was: 1960, 240 cases involving 1383 violations; 1961, 232 cases involving 1532 violations. Annual Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1960, p. 224; *id.*, for the year ended June 30, 1961, p. 228. For the fiscal year ending June 30, 1962, the records of the Department of Justice show a total of 257 cases involving 1536 violations.

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CONCLUSION

This appeal presents a substantial question involving protection of the public health. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE P. MILLER,
Attorneys.

MARCH 1963.

APPENDIX A

AN ORDER DISMISSING INFORMATION

United States District Court
Southern District of Florida

No. 12,256–Cr–J

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY,
a corporation.

Order Granting Motion To Dismiss

This cause was taken under advisement on October 19, 1962, on defendant's motion to dismiss made in open court. The plaintiff and defendant now having filed briefs, it appears that said motion should be granted.

21 U.S.C. 331(k) prohibits the specific acts of alteration, mutilation, destruction, obliteration or removal of the labeling of, a food, drug, device or cosmetic. This enumeration of specific acts is followed by the general term, "or the doing of any other act." The information alleges that adulteration was caused by the defendant's act of holding certain food in its warehouse, which was accessible to rodents, birds and insects.

The government contends that one of the purposes of Congress in enacting Section 331(k) was to prohibit the holding of food after shipment in interstate commerce under insanitary conditions whereby such food may become contaminated with filth, and cites

House Report No. 807, 80th Congress, 1st Session, July 8, 1947 at page 3:

> "As so amended the subsection will penalize among other acts resulting in adulteration or misbranding, the act of holding articles under unsanitary conditions whereby they become contaminated with filth or rendered injurious to health."

This not only makes one holding such goods an insurer but subjects him to criminal action. Under the rule of construction known as *ejusdem generis*, where a general term follows an enumeration of specific classes of activities, the general term will be limited to the same general nature as those enumerated. The rule is applicable only where intent is not discoverable from the statutory language, and it may not be used to defeat the obvious purpose of legislation. *United States* v. *Alpers*, 338 U.S. 680 (1950). Congress may have intended the construction advocated by the prosecution, however, the statute, as it is presently written, is too vague and indefinite to apply to the mere act of "holding" goods. In an effort to uphold the statute as constitutional, strict rules of construction must be applied; therefore the information does not allege an offense under Section 331(k), and it is thereupon:

> ORDERED that defendant's motion to dismiss is granted.
>
> DONE AND ORDERED in Chambers, at Jacksonville, this *21st* day of December, 1962.
>
> Original signed:
>
> /S/ BRYAN SIMPSON,
> UNITED STATES DISTRICT JUDGE.

United States Attorney (3)
(Hamilton)
Ulmer, Murchison, Kent, Ashby & Ball

APPENDIX B

INFORMATION

F.D.C. No. 47122

In the United States District Court for the Southern District of Florida Jacksonville Division

No. —

(21 U.S.C. 331 and 333)

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY, A CORPORATION

COUNT I

The United States Attorney charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about April 28, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Rayne, Louisiana, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

10 LBS. NET WT.
LONG GRAIN
RICE
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana

That thereafter, to wit, within the period from on or about April 28, 1961 to on or about August 21, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of rodent excreta, insects, insect larvae and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT II

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about April 28, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Rayne, Louisiana, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

WATER MAID
10 LBS. NET WT.
RICE
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana

That thereafter, to wit, within the period from on or about April 28, 1961 to on or about August 22, 1961, and while said food was being held for sale

after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342 (a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, insect pupae, and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT III

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the

State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about January 6, 1961, receive at Jacksonville, State of Florida, a number of packages of hamburger mix, a food, which said food had been shipped in interstate commerce from Milstadt, Illinois, by Golden Dipt Manufacturing Co.;

That displayed upon said packages was certain labeling which consisted, among other things, of the following printed and graphic matter;

10 OZ. NET WT.
GOLDEN DIPT
BURGER BOY
MIX FOR
HAMBURGER
GOLDEN DIPT MANFACTURING CO.
ST. LOUIS 10, MO.

That thereafter, to wit, within the period from on or about January 6, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of packages of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to con-

tamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342 (a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT IV

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about May 24, 1961, receive at Jacksonville, State of Florida, a number of packages of breading mix, a food, which said food had been shipped in interstate commerce from Millstadt, Illinois, by Golden Dipt Manufacturing Co.;

That displayed upon said packages was certain labeling which consisted, among other things, of the following printed and graphic matter:

5 POUNDS NET WT.
GOLDEN DIPT
ALL PURPOSE
READY MIXED
BREADING
GOLDEN DIPT MFG. CO.
ST. LOUIS 10, MO.

That thereafter, to wit, within the period from on or about May 24, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of packages of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insani-

tary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT V

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about July 24, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Carlisle, Arkansas, by Louisiana State Rice Milling Co., Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

10 LBS. NET WT.
MAHATMA
LONG GRAIN RICE
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana
and subsidiary
Arkansas State Rice Milling Co.
Carlisle, Arkansas

That thereafter, to wit, within the period from on or about July 24, 1961 to on or about December 1, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of rodent urine, insects, insect larvae, insect pupae, and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT VI

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation

organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about September 6, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Carlisle, Arkansas, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

WATER
MAID
RICE
10 LBS. NET WT.
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana
and subsidiary
Arkansas State Rice Milling Co.
Carlisle, Arkansas

That thereafter, to wit, within the period from on or about September 6, 1961 to on or about December 4, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, insect pupae and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

(S) EDWARD F. BOARDMAN,
United States Attorney for the Southern District of Florida.

By: WILLIAM J. HAMILTON, Jr.,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1963